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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 1444

PORT OF NEW YORK AUTHORITY, ALBERT RUBBERT, Manager of the PORT AUTHORITY BUS TERMINAL, CAPTAIN ROBERT FRIEND, Commanding Officer of Port Authority Terminal Police, LIEUTENANT JAMES PETTIS, LIEUTENANT FRED RACKOWSKI, LIEUTENANT HUGO SERRATI, LIEUTENANT ANTHONY UNETICH and LIEUTENANT GEORGE GAULRAPP, Officers of the Port Authority Terminal Police,

Petitioners,

v.

RONALD G. WOLIN, individually and on behalf of VETERANS AND RESERVISTS TO END THE WAR IN VIETNAM and the FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners[1] respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed as modified an order of the United States District Court for the Southern District of New York.

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[1] The Port of New York Authority, Albert Rubbert, Manager of the Port Authority Bus Terminal, Captain Robert Friend, Commanding Officer of the Port Authority Terminal Police, Lieutenant James Pettis, Lieutenant Fred Rackowski, Lieutenant Hugo Serrati, Lieutenant Anthony Unetich and Lieutenant George Gaulrapp, Officers of the Port Authority Terminal Police, hereinafter collectively referred to as the "Port Authority."

Opinions Below

The opinion of the Court of Appeals is reported at 392 F. 2d 83, and is printed herein as Appendix A to this petition.

The opinion of the District Court is reported at 268 F. Supp. 855, and is printed herein as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on March 1, 1968.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Does an invitation to the public to utilize interior portions of a public bus terminal for purposes of access to and from bus platforms and shops and services incidental thereto, require the conclusion that the premises are available to all for leafleting, carrying placards and establishing card table centers for the propagation of ideas and opinions, subject only to the right of the public owner to establish regulations as to time, number, duration and specific locations?

2. Must the public bus terminal operator permit persons to use the interior walkways and lobbies of the terminal as a public forum for the airing of opinions having no relation or pertinence to the terminal's functions or administration, where the only possible nexus between the speech and the terminal is plaintiff's view that he may most effectively reach his chosen audience inside the terminal rather than continue to reach them on the sidewalks surrounding the terminal and abutting its entrances and exits?

Constitutional and Statutory Provisions Involved

1. The following constitutional provisions are involved:

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech. . . ."

United States Constitution, Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. The following statutory provisions are involved:

Title 42 United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

McKinney's Unconsol. Laws § 6701; New Jersey Rev. Stat. 32:2-23.1.

". . . a motor bus terminal (by which is meant a terminal consisting of one or more buildings, structures, improvements, loading or unloading areas, parking areas or other facilities, necessary, convenient or desirable in the opinion of the Port Authority for the accommodation of omnibuses and other motor vehicles operated by carriers engaged in the transportation of passengers, or for the loading, unloading, interchange or transfer of such passengers or their baggage, or otherwise for the accommodation, use or convenience of such passengers or such carriers or their employees). . . ."

New York Penal Law, § 240.35 (7) and (8):
"A person is guilty of loitering when he:

• • •

"7. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; or

"8. Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence. . . ."

Statement

Respondent seeks for himself and other members of the Veterans & Reservists to End the War in Vietnam and the Fifth Avenue Peace Parade Committee, a declaration that the First and Fourteenth Amendments of the United States Constitution confer a right on him and those he represents to hand out pamphlets, to carry placards and to distribute literature from card tables in the interior of petitioner's Bus Terminal in Manhattan, New York City. The respondent's purpose is to utilize these areas inside the Terminal as a forum in which to air his protests against participation by the United States in the Vietnam conflict. Petitioner, the Port of New York Authority, a body corporate and politic created by Compact between the States of New York and New Jersey, has constructed and now owns and operates the Bus Terminal in partial effectuation of its governmental duty to provide, on behalf of the two States, terminal, transportation and other facilities of commerce in and for the Port of New York.

Petitioner, it is conceded, has never permitted use of the interior of this, the world's busiest bus terminal, by any person as a forum for airing opinions or beliefs.

Respondent's position in this litigation is that petitioner cannot confine respondent's activities to the sidewalks which surround the Terminal, but must permit those activi-

es to be conducted inside the Terminal itself. The au-
ence which respondent has particularly selected is the
aveling servicemen who utilize the Terminal en route to
d from their military installations. Respondent prefers
convey his message to them inside the Terminal as they
it for or alight from buses rather than to approach these
rvicemen, as he has done in the past, on the sidewalks ad-
ining the Terminal. Respondent expressed his position
follows:

> "We intend to conduct our activities inside the terminal because this is the most effective—and perhaps the only effective—way to achieve our purpose." (A 4)

The Port Authority has declined to grant respondent
rmission to conduct these activities inside the Terminal
ely because it deems it to be its official responsibility to
nfine the use of the Terminal to the governmental and
blic purposes for which the two States authorized it to
nstruct and operate the facility—the accommodation of
ses and the accommodation, use and convenience of
ssengers.[1]

Respondent and members of his groups, nevertheless,
tered the Terminal on two occasions and distributed leaf-
s in areas near the gates on the upper floors of the Term-
l used by buses serving military installations. Each
ne respondent and his associates were directed to dis-
ad and leave the building, each time they refused to do so
il threatened with arrest.

Counsel for respondent and petitioner conferred.
ere were no arrests and no further intrusions by re-
ondent's groups. Respondent instituted this action to
ermine his rights, thereby bringing before the courts
estions which the Court of Appeals for the Second Cir-
t has described as "significant and perplexing" and as
ctfully and carefully framed for us by the parties who
pear here in confrontation after a constitutional *pas de*
x." (A 1)

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[1] See McKinney's Unconsol. Laws § 6701; New Jersey Rev.
. 32: 2-23.1.

The District Court, per Mansfield, J., upheld respondent's right to distribute leaflets on the concourses of the Terminal. The Court of Appeals, per Kaufman, J., affirmed, holding that the "congestion and controversy that may attend the activity in the Terminal, while pertinent to the enactment of rules and regulations to govern the activity, cannot be invoked to support a flat prohibition." (A 15)

The District Court did not resolve the issue as to whether or not respondent's picketing and card table centers were protected under the First Amendment. The Court of Appeals held:

> "We believe each proposed activity must be afforded some measure of protection. Whether we speak of placards or conversation or tables laden with literature we deal with forms of communication developed to express the plaintiff's views to the particular audience. The methods adopted may be unsophisticated or crude and even ineffectual when compared with other means, but they are no less robust and no less intended to air the speaker's views as effectively as his resources and energy permit." (A 16-17)

Reasons for Granting the Writ

The Significance of the Issues

The Court of Appeals' opinion establishes that this case presents—in a clean-cut, sharply-defined setting which is devoid of penal overtones—the novel and difficult question of whether the States are constitutionally required to provide interior portions of public terminal buildings as places in which people can demonstrate against public policies bearing no relationship to the operation or administration of the terminal.

The public proprietor of the Terminal deemed it mandatory to proscribe the Terminal's use as a public forum for the conduct of free speech activities, viewing such activities as being inherently inconsistent with the dedication of the

property to the limited use of Terminal purposes. The demonstrators claim that the public has free access to the Terminal as a practical matter, that their protest would be peaceful and that they promise to avoid causing substantial congestion or disorder in the Terminal.

No decision of this Court has dealt explicitly with the issue thus posed—whether or not the interior of a public terminal is available for use as a public forum.

We submit that this is the case in which this Court should apply its existing dictum that "there is a proper time and place for even the most peaceful protest"[1] to hold the interior of the busiest bus terminal in the world is hardly the proper place for a demonstration.

We submit further that this case presents an opportunity for this Court to analyze and to compare prior pertinent expressions by its members to the end that the majority may synthesize principles controlling the extent to which the protection of other public interests must be subordinated to the individual's right to stage a public protest. Such action by this Court would resolve existing conflict between federal court decisions as well as in the holdings of State courts on the First Amendment issues involved here.

The Error in the Approach of the Lower Courts

The holdings of the courts below constitute on the one hand, an extension of this Court's holding in *Marsh* v. *Alabama*, 326 U. S. 501 (1946) and on the other, a narrow reading of this Court's decision in *Adderley* v. *Florida*, 385 U. S. 39 (1966) and of this Court's statements in *Cox* v. *Louisiana, supra.*

Marsh held that the streets of a company-owned town were available for the distribution of religious pamphlets, notwithstanding that the title to the streets was in private hands.

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[1] Cox v. Louisiana, 379 U. S. 559, 574 (1965).

Recognizing the self-evident functional differences between the streets of a company-owned town and the interior of a busy bus terminal, the lower courts sought additional support for their ruling from the famous dictum of Mr. Justice Roberts in *Hague* v. *CIO*, 307 U. S. 496, 515-16 (1939).[1] It must be recalled, however, that Mr. Justice Roberts limited his eloquent statement to the permissible use of streets and parks although the ordinances before him applied as well to the interior of public buildings.

That the Court of Appeals exaggerated the thrust of Justice Roberts' words is clear from its description of them as the "touchstone for courts charged with accommodating rights of expression with other interests at play in the public forum." (A8) Mr. Justice Frankfurter's statement concurring in *Niemotko* v. *Maryland*, 340 U. S. 268, 282 (1951) suggests the later limitations placed by this Court on the scope of Mr. Justice Roberts' exposition:

> "While the Court has emphasized the importance of 'free speech,' it is recognized that 'free speech' is not in itself a touchstone."

Justice Frankfurter framed the issue as to the permissible use of streets as one of "how to reconcile the interest in allowing free expression of ideas in public places with the protection of . . . the primary uses of streets and parks."[2]

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[1] "Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[2] 340 U. S. 268, 276.

The lower courts' reasoning here, we submit, failed to honor *Adderley* v. *Florida, supra,* which holds that persons demonstrating against a segregated jail had no right even to assemble in the open driveway adjoining the jail which was itself the subject matter of the demonstration. In *Adderley,* the petitioners argued that use of the jail's driveway was not only reasonable, but also particularly appropriate. Mr. Justice Black, writing for the Court, rejected this thesis for reasons which dictate the conclusion here that the interior of a bus terminal is not a reasonable and appropriate location for staging demonstrations:

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners relied on. [citations omitted] We reject it again." 385 U. S. 39, 47-48

The majority of the Court in *Adderley* applied precisely the approach articulated in several of the opinions in the decisions in *Cox* v. *State of Louisiana, supra.* In *Cox,* Mr. Justice Goldberg, writing for the majority, stated:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." 379 U. S. 536, 554

Mr. Justice Black stated:

> "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.* This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. [Citation omitted] Were the law other-

> wise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear." 379 U. S. 559, 578 (concurring opinion) (emphasis in original).

This Court's recent decision in *Amalgamated Food Employees Union Local 590 et al* v. *Logan Valley Plaza Inc., et al*, 36 U. S. L. W. 4385 (U. S. May 20, 1968) leaves open the precise question presented here. The Court held that open areas within the confines of a shopping center functioning as thoroughfares and sidewalks are available to persons who are picketing a store in the center in the course of an effort to organize the store's employees. Mr. Justice Marshall, writing for the majority, stressed two factors not present here:—(1) *Marsh* v. *Alabama, supra,* establishes a constitutional right to conduct free speech activities in the streets and sidewalks of a business district, and (2) the open areas of a shopping center are indistinguishable from streets and sidewalks in a business district where the speech criticizes practices being carried on in the shopping center itself.

The opinions of both the majority and the minority emphasize the importance of the function to which the property in question is devoted and that a pivotal question is whether a ban on speech activities there would frustrate or prevent communication of ideas.

Respondent Wolin and his groups made no claim, nor could they, that the functions of a bus terminal in Manhattan in any way relate to the foreign and military policies they are protesting.

Thus, we do not have here the situation in *Logan Valley* which was described by Mr. Justice Marshall as: "Naked title is essentially all that is at issue." 36 U. S. L. W. at 4389 and by Mr. Justice Douglas, in concurring, as:

> "Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business." *Id.* at 4390.

The lower court's threshold error here was in stating that the issue is whether or not "the terminal so resembles a public thoroughfare to make it an appropriate place for the exercise of First Amendment rights." (A7) The opinions and decisions of this Court make clear that all public thoroughfares are not invariably subject to a "First Amendment easement"[1] at all times. *Cox* v. *Louisiana, supra,* holds that picketing and parading may be prohibited on streets at or near court houses; *Sp owal* v. *New York,* 385 U. S. 649 (1967), upholds a ban against leafleting on streets within a specified distance of school buildings in New York City, and *Adderley* v. *Florida, supra,* sustains denying the use of a driveway adjoining a jail as the locus for a public protest against racial segregation in the jail.

Mr. Justice Black in *Cox* v. *Louisiana, supra,* suggests that the Constitution would permit an absolute prohibition of demonstrations in the streets. And Mr. Justice Goldberg was careful to note in *Cox,* that:

> "We have no occasion in this case to consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." 379 U. S. at 555.

Accordingly, to determine that the interior of a bus terminal resembles a street, even if not erroneous in itself as we shall urge hereafter, is not dispositive of the constitutional question as to whether it is an appropriate and reasonable locale for demonstrations.

The Criteria for Classifying Public Forums

The Court of Appeals justified classifying the interior of the Terminal as a public forum on the ground, *inter alia,* that it is by its nature, noisy and crowded. We submit that a finding that the interior of a building is "noisy and

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[1] See *Kalven, The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 SUP. CT. REV. 1, 13.

crowded" requires excluding it from the class of a public forum.

The inversion inherent in the Court's approach becomes apparent when its ultimate conclusion is read together with the Court of Appeals' earlier acknowledgment that (1) "With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided" (A 10); and (2) circumstances in the Terminal have required the enactment of special Penal Law provisions "to prevent terminals from being infested by those 'who have no occasion to be there', such as congregations of degenerates or nondescript characters who pose a danger to the public." (A 29, A 13)

The Court of Appeals rejected as controlling criteria "the availability of some alternative forum, and the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal, . . . " or "the potential provocation caused by heated debate. . . ." These factors were labeled by the Court of Appeals as "not material" in considering a "blanket and wholesale ban." (A 15)

These very factors are not only material but should control the issue of whether a given location is natural and appropriate for the exercise of the right of free speech. Particularly pertinent in sorting out the contending interests is the fact that if Wolin and his groups are granted a right to use the interior of the Terminal as a public forum, an equal right must be extended to each and every citizen. *Cox* v. *State of Louisiana*, 379 U. S. 536, 557-58; *Niemotko* v. *Maryland*, 340 U. S. 268, 272. The District Court, in attempting to limit the ambit of its decision as "dealing only with the rights of the plaintiff and those whom he represents" (A 33), obviously failed to evaluate fully the problem of a proliferation of leafleters in the Terminal.

It is, we submit, ingenuous to decide that a terminal is an appropriate location for free speech activities because this respondent promises to be peaceful or because not every

leafleter will at all times obstruct or interfere with terminal traffic. Realism requires considering, as well, the existence of extremists and the difficulty in reaching agreement on the administrative level with demonstrators as to exactly what circumstances constitute congestion or obstruction.

When it is acknowledged that the interior of the Bus Terminal accommodates over 200,000 people on a daily basis, and that it is normally thronged with commuters rushing between their homes and places of work, and with long distance travelers laden with baggage and the anxieties attendant upon a long journey, it is submitted that far more compelling reasons, founded on discrimination or suppression of ideas or the unavailability of an alternate forum, would be necessary before a court should grant the entire community a right to inject the dissemination of political and other issues into the ferment and the complex policing problems already present in the Terminal building. It can hardly be said that the commuters and the long distance travelers are to be insulated from the airing of ideas and opinions, for all are in accord that the sidewalks surrounding the Terminal and abutting the entrances and exits of the Terminal are available for free speech activities and these give speakers and leafleters access to the users of the Terminal.

Regulatory Power Does Not Ensure Continued Priority for the Primary Terminal Usage

Both lower courts, recognizing "the legitimate public interest in maintaining a free flow of traffic in the Terminal, in avoiding excessive disruption of normal activities there, and ensuring the convenience and movement of passengers and vehicles" held that the public proprietor may prescribe "rules of order" for the use of the premises. (A 18; see A 31) These may include "approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised." (A 18-19; see A 34-35)

This approach continues the analogy drawn by the lower courts between the interior areas of the Bus Terminal and a public thoroughfare.

Our nation's history and its continuing experience with conflict between municipal proprietors of parks and thoroughfares and those using them for communicating ideas teaches that the right of regulation is not a satisfactory solution to the delicate and difficult question of the extent to which the protection of other street and park users may legitimately limit expression. The reports of the decisions of this Court abound with opinions, seldom unanimous, in which municipal regulation of the use of streets and parks has been upheld or struck down depending upon intricate analyses of their terminology and intensive examination into the minutiae of the facts surrounding their application.[1] The volume of these cases together with the many state and lower federal court cases dealing with the issue, indicates that the administration of the use of the streets and parks as public forums is to a large extent vested in the courts rather than in administrative agencies.

Many of the conflicts described have stemmed from honest differences of opinion between individuals and municipal authorities, neither of whom could be accused of extremism, suppression or discrimination.

What is peaceful, what is obstructive, what interferes with other proper activities, who causes congestion or disorder—these are all questions with subjective content which can finally be answered only by the courts after a trial.

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[1] See, *e.g.*, Cox v. Louisiana, 379 U. S. 536 (1965); Talley v. California, 362 U. S. 60 (1960); Feiner v. New York, 340 U. S. 315 (1951); Kunz v. New York, 340 U. S. 290 (1951); Niemotko v. Maryland, 340 U. S. 268 (1951); Kovacs v. Cooper, 336 U. S. 77 (1949); Saia v. New York, 334 U. S. 558 (1948); Cox v. New Hampshire, 312 U. S. 569 (1941); Cantwell v. Connecticut, 310 U. S. 296 (1940); Schneider, v. Irvington, 308 U. S. 147 (1939); Hague v. CIO, 307 U. S. 496 (1939).

The sound truck cases are an apt example.[1] The competing interests there were each beyond reproach—the municipality's right to achieve relative tranquility in the streets was opposed by the individual's right to communicate effectively.

Similar issues will arise here where the proper public interest in providing and operating an efficient, convenient, comfortable public terminal is in contention with individual claims of right to communicate with the terminal population. Attempting to balance these interests by regulation will involve conflicts of opinion as to which interest has priority, and to what extent, and these will be as difficult and productive of litigation, if not more so, than street and park regulations have been.

When it is acknowledged that communicators have access to the terminal's users on the street adjoining the terminal, the wisdom of confining their activity to the streets seems apparent if only to avoid the problems above described. In doing so, the Court would as well be confining future controversies as to the preeminence of speech over other public interests to the traditional and familiar setting of street and park uses.

The Limited Scope of the Dedication of Bus Terminal Property

The lower courts classified the interior of the Bus Terminal as a public street or thoroughfare because (1) they regarded it as "a place clearly available to the general public," (2) it is heavily used, (3) "in design and physical appearance the main concourse resembles a street," and (4) is used by people "for the principal purpose of moving to and from other means of transportation" (A 9-10; see 28-29). Those courts therefore deemed it an appropriate place for expression.

We submit that particularly because the Terminal is principally designed for and defined by statute as a means

[1] *Compare* Saia v. New York, 334 U. S. 558 (1948), *with* Kovacs v. Cooper, 336 U. S. 77 (1949).

of accommodating buses and their passengers, it is a distortion of its function to classify it as a public forum. Not every citizen is invited to use the interior of the Terminal for every purpose permitted in a street or park. Under a New York statute, it is a violation to loiter or lounge or solicit alms or play a musical instrument in the interior of the Terminal.[1] By and large, these activities are permitted and, in fact, are usual in parks and streets.

It has not been claimed yet that any person has a right to conduct a parade or a public meeting in the interior of the Bus Terminal. Such a request, however, would not appear to offend the logic of the lower courts' decisions.

The lower courts' view is that, because as a practical matter, not every person entering the Terminal is, or realistically could be, challenged to prove that he enters the building strictly for Terminal purposes or services, it is a thoroughfare. But this rationale would throw open to demonstrators every building within which there are stores or restaurants or public functions, if the proprietor does not maintain gates or police to screen out persons seeking entry.

It would strike down the statute enacted at this session of Congress[2] to regulate free speech activities at the Capitol buildings. Under that statute no persons may parade, demonstrate or picket within any of the Capitol buildings. Because the Capitol buildings are freely open to the public the opinions below suggest that this statute suffers the same constitutional infirmities which have thus far invalidated the prohibition against using the interior of a bus terminal as a public forum.

With respect to the design and physical appearance of the Terminal, the Court of Appeals could say no more than that a portion of it "resembles a street." This careful phrasing perhaps reflects the record's clear showing that

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[1] N. Y. Penal Law § 240.35(7).

[2] Act of October 20, 1967, Pub. L. No. 90-108 § b.

e prime location in the Terminal sought by the demon-
rators is a comparatively narrow corridor and waiting
ea on the third floor of the building. This area adjoins
e gates for buses destined for military installations and,
Sunday evenings, is heavily used by servicemen return-
g to bases. There are no stores or concessions in the area.

Although this portion of the Terminal in no way resem-
s a street, the Court of Appeals did not exclude it from
ng available for leafleting, picketing and card tables. On
e contrary, in light of respondent's desire to reach the
rvicemen, the Court of Appeals admonished the Terminal
erator to be "mindful", in drafting regulations, "that
e plaintiff has a constitutionally cognizable interest in
ching a broad audience, that he is entitled to do so within
its tolerable in light of the usual activities in the Ter-
nal." (A 19)

Once having decided to return to their bases by inter-
te bus, the servicemen must utilize this bus terminal and
third floor area to board or wait for their buses. The
er courts have decided that they also have no choice but
be confronted, as they wait or queue, by respondent and
groups (and possibly others) and their activities in fur-
rance of propagating their views and ideas on foreign
icy.

The thousands of commuters who travel to Manhattan
interstate bus are also forced to encounter the activities
those selecting the bus terminal as the forum for their
as and opinions.

It is no doubt more convenient and comfortable for re-
ndent and his groups, and a host of other groups, includ-
political candidates, to reach their own specially selected
iences inside the weatherproofed Terminal than on the
oining sidewalks. Yet those "audiences" are required
be in the Terminal to serve their transportation needs.
y have not chosen to group there in order to hear, to
d and to discuss opinions and ideas. The respondent and
groups therefore seek to capitalize on the audience's
l for transportation rather than to compete for their

attention in the free market of street and park areas where every citizen has come to expect, along with his transit or leisure, the communication of ideas and opinions.

The Port Authority's position is that it is the building's function as a terminal and not, as the Court of Appeals suggests, the presence of a roof which distinguishes it from a market place for expression. In any event, the holding of the Court of Appeals necessarily means that all off-street bus terminals throughout the country whether privately or publicly owned and whether open or covered, constitute public forums, particularly if they include incidental services such as the usual newsstand, barber shop, lunchstand or drugstore.

The compass of the holding below has already been given a broader scope. *People* v. *St. Clair*, 56 Misc. 2d 326 (Criminal Court, N. Y. C., 1968) holds, in reliance on the Court of Appeals' decision here, that a person having paid his fare, has the constitutional right to distribute political leaflets on a subway platform in the heart of the Manhattan shopping district at the height of the Christmas shopping season.

The Question of Title is Immaterial; the Property's Function Controls

The Bus Terminal is owned and operated by a public agency for governmental purposes. That fact alone is not dispositive of the question whether it constitutes a public forum.

It cannot be questioned that some public property is dedicated to purposes whose fulfillment is incompatible with its use or its availability as a means for communicating ideas and opinions. The administration of a building and the control of large crowds using the building for its primary purpose present quite different operating and functional problems and requirements than exist in the case of streets or parks or meeting halls. Building regulations are structured and administered for the con-

venience and protection of the group of the public invited to use the building for its primary purpose, and therefore, necessarily involve strictures which cannot, nor should they be, imposed on the use of streets or parks. The addition of another layer of uses and their nature as constitutionally protected, not only increases the burdens of the proprietor of the building, but as well, tends to subordinate the interests of the primary user of the building.

The traveler can claim only a statutory or common law right to use the services which are available, without discrimination, on the property; whereas, once admitted, the free speaker can hearken to a constitutionally-protected right. The Bus Terminal proprietor could, for example, decide that it is no longer convenient to afford to its patrons the services of a lunchstand in the main lobby, but it could not, under the decisions below, decide that respondent and his groups could not use a portion of the building for the establishment of a card table from which to distribute their literature. So too, the proprietor of the Terminal is free at any time to rescind permission given, from time to time, to charitable groups to solicit funds within the interior of the Terminal, as it is free to decide that glee clubs will not be permitted to sing in the building during future holiday seasons. None of these groups has ever claimed a constitutional right to conduct these activities. Respondent and his groups, on the other hand, under the decisions below, could never be denied the right to use the building as a public forum.

* * *

It is respectfully submitted that the above described essential distinctions between the dedication of property for public terminal purposes and the dedication of property for use as a public forum for the expression of ideas or opinions warrant review and reversal of the Court of Appeals' holding.

Although the Court of Appeals here rejected the position urged by petitioners, virtually the same position was

accepted by the Federal District Court for the Northern District of Illinois in *Nelson* v. *City of Chicago*, 9 Avi. (CCH) 17,878 (1965) and by the Appellate Division of the Superior Court of New Jersey in *State* v. *Kirk*, 88 N. J. Super. 130, 211 A. 2d 200 (1965). These decisions forbade picketing inside the principal terminal building at two large airports. To the contrary is *In re Hoffman*, 64 Cal. Rptr. 97, 434 P. 2d 353 (Cal. Supreme Ct. 1967), holding that leafleting is permissible in the interior of a railroad station in the city of Los Angeles and *People* v. *St. Clair*, *supra*, allowing the distribution of leaflets on New York City subway platforms. This conflict on important constitutional and public questions affords an additional basis for review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY GOLDSTEIN,
General Counsel, The Port of New York Authority,
Attorney for Petitioners.

On the Brief:
PATRICK J. FALVEY

May 29, 1968

PROOF OF SERVICE

I, SIDNEY GOLDSTEIN, a member of the Bar of the Supreme Court of the United States and attorney for the Petitioners, hereby certify that on the 29th day of May, 1968, I served copies of the foregoing petition for a writ of certiorari on the Respondent Ronald Wolin by ~~mailing~~ causing to be mailed three copies in a duly addressed envelope with first class postage pre-paid to each of the following:

EUGENE EISNER, ESQ.
13 Astor Place
New York, N. Y. 10003

BRADLEY BREWER, ESQ.
New York Civil Liberties Union
156 Fifth Ave.
New York, N. Y. 10010

s/ SIDNEY GOLDSTEIN

Sidney Goldstein

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

Opinion per Kaufman, J.

KAUFMAN, *Circuit Judge:*

Ronald Wolin and the organizations he represents[1] have brought before this court questions that are significant and perplexing. We set them forth seriatim. May the Port of New York Authority[2] bar the use of its Terminal to all exercise of First Amendment rights? Are the peaceful activities proposed by the plaintiff, including distribution of leaflets, carrying placards, setting up card tables and conducting discussions with passers-by entitled to substantial protection under the First and Fourteenth Amendments? Are the plaintiff and his associates, who have promised to withdraw and discontinue these activities in the event of a disturbance, entitled to official protection against disturbances provoked by a hostile audience? These questions have been tactfully and carefully framed for us by the parties who appear here in confrontation after a constitutional *pas de deux.* Some fifteen months have passed since the plaintiff first sought to exercise his asserted right of protest.

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[1] The plaintiff Ronald Wolin sues individually and on behalf of two organizations opposed to United States policy in Vietnam. The organizations are the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War in Vietnam.

[2] Defendants are the Port of New York Authority, Albert Rubbert, the Manager of the Port Authority Bus Terminal, Captain Robert Friend, Commanding Officer of the Port Authority Police, and Lieutenants James Pettis, Fred Rackowski, Hugo Serrati, Anthony Unetich and George Gaulrapp, Officers of the Port Authority Terminal Police. We shall refer to the defendant collectively as the "Port Authority," and to the building as the "Terminal."

We hold that the Port Authority may not abridge by absolute prohibition the right of political expression. The peaceful activities proposed by Wolin are protected against denial by the Port Authority, and accordingly, they may be restricted only by regulations narrowly drawn to serve legitimate interests of the general public who use the Terminal. We therefore affirm the judgment of the District Court, with modifications as set forth.

I.

During the latter part of 1966, Ronald Wolin and others associated with the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War in Vietnam assembled outside an entrance to the Bus Terminal building operated by the Port of New York Authority at Eighth Avenue and 40th Street, Manhattan. They came there for the purpose of distributing literature to persons on the sidewalk and occasionally engaging in conversation with persons in the area. These activities, designed to publicize the views of the group concerning the Vietnam war, were at all times conducted in a peaceful and orderly manner.

The Port of New York Authority is a public corporation created in 1921 by agreement between the States of New York and New Jersey. McKinney's Unconsolidated Laws of N. Y., § 6401, § 6404. The Bus Terminal building operated by the Port Authority occupies a full city block in Manhattan. Thousands of persons use the terminal facilities, entering from the subway or through six outside entrances, using the fifty foot wide main concourse and four other levels to get to and from buses, subways, city streets, shops and other concessions. In 1966 the average number of persons passing through the building each day approximated 205,000 and on December 24, 1966 some 325,000 people used the facility. The Terminal contains,

in addition to the open concourse areas and waiting rooms, bus line ticket counters, newsstands, restaurants, snack bars, a bakery, a drugstore, a bar, a bowling alley, a bank, gift shops and various other shops and concessions which are open to the general public. The defendant Albert Rubbert is the manager of the Terminal with general supervisory responsibility for its operations. The Port Authority maintains its own police force of 38 men who are charged with maintaining order and patrolling the terminal; the defendant Captain Robert Friend is the head of this contingent of the Port Authority police, and the other named defendants are officers assigned to duty in the terminal.[3]

In early November, 1966 Wolin and his group decided to take their protest inside the terminal where they might find in greater numbers than on the sidewalks their particular audience, traveling servicemen. Accordingly, with five others, Wolin entered the terminal on the evening of November 6 and distributed leaflets in the area near gates 108-115 on the upper bus level for approximately 80 minutes. Although it is agreed that their conduct was peaceful and did not cause any interference with the traffic in the Terminal, they were nevertheless approached by Lieutenant Serrati who requested their names. The six individuals refused to comply with Serrati's request and after some discussion, he threatened to arrest them if they refused to disband and leave the building. During this discussion, the police officer stated that the protesters were on "private" property, and demanded to know if they were there for the purpose of buying a ticket or travel by bus. The plaintiff and his associates replied that they were exercising their right of free speech by distributing the leaflets.

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[3] The Terminal police are expressly provided with the powers of "peace officers." N. Y. Code of Crim. Proc. § 154.

In this brief confrontation the pattern for the future encounters was set. On November 13, plaintiff entered the building with two others, and distributed handbills for about thirty minutes before they were asked to leave by Lieutenant Gaulrapp. Next, on November 16, 1966, plaintiff wrote to defendant Rubbert, the Manager of the Terminal, to request permission "to conduct free speech activities in the public areas of the Port Authority Bus Terminal"; in particular to distribute political handbills, to carry placards, to use card tables for the distribution of literature, to engage in discussions with others. Wolin proposed to conduct these activities every Sunday evening, and, in addition, on Wednesday evening, November 23, Friday evening, December 23 between 6 p.m. and 11 p.m. and Saturday, December 24, 1966 between 11 a.m. and 11 p.m. The nature of the proposed protest activity was evident from the letter:

> The purpose of the activities covered by this request will be to communicate our views concerning the Vietnam war to traveling servicemen and to members of the public within the terminal and to persuade them to join our cause.
>
> We do not intend to interfere in any significant or substantial way with the operation and use of the terminal for the convenience of bus passengers or other persons who may be passing through or waiting in the building. . . .
>
> We intend to conduct our activities inside the terminal because this is the most effective—and perhaps the only effective—way to achieve our purpose. . . .
>
> We do not intend to be in any way riotous, tumultuous, violent, threatening, intimidating, abusive, obscene, or insulting; nor do we intend to incite, provoke, or encourage any such behavior by anyone else. . . . If a situation should arise which the Terminal police cannot control, we shall temporarily cease our activities until such situation no longer exists. We intend to obey any police order reasonably de-

signed to prevent serious disorder or blockage of pedestrian traffic.

Action leading to this lawsuit soon followed. On November 17, 1966, Rubbert denied the plaintiff's request, relying on the regulations governing use of the Terminal facility and the consistent policy of the Port Authority to deny permission to groups interested in conducting demonstrations or distributing leaflets in the building.[4] The Manager

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[4] The Manager of the Terminal based his refusal of Wolin's request on the following rules and regulations promulgated pursuant to § 6419, McKinney's Unconsolidated Laws:

"2. The Superintendent of the Terminal shall have authority to deny the use of the Terminal to any individual violating Port Authority Rules and Regulations, or laws, ordinances or regulations of . . . the State of New York or the City of New York.

"5. No person shall carry on any commercial or other activity at the Terminal without permission.

"8. No person shall post, distribute or display signs, advertisements, circulars or printed or written matter within the Terminal without permission."

In addition, without defining what constitutes a "nuisance," Regulation 12 prohibits any person from doing any act or thing which shall result in a creation or maintenance of a "nuisance" at the Terminal. In practice the decision to grant or deny a request in any particular case has been delegated by the Port Authority to Rubbert, the Manager of the Terminal, and it has been stipulated that his consistent policy is to deny all requests made by individuals or groups seeking access to the Terminal for the purpose of distributing leaflets or engaging in other protest activities.

It is not disputed that the Port Authority has in the past granted permission to use the facility for other purposes. Charitable contributions have been solicited, glee clubs have sung in the Terminal, and broadcast their performance over the loud speaker system. Moreover, on occasion and for a fee, the Terminal has permitted automobile manufacturers to display their products and to distribute promotional literature in the concourse areas. The Port Authority has indicated that those who wished to communicate political views were denied access because unlike these other groups, their activity is provocative and controversial.

threatened arrest if the plaintiff persisted in his desire to protest within the Terminal.

Wolin then brought this action in the Southern District, seeking a declaratory judgment that he be permitted to distribute leaflets and to conduct other enumerated activities in the main concourse and passageways of the Terminal. Plaintiff also asked that the defendants be enjoined from restraining such activities, or arresting those persons exercising their rights of protest, or requiring him to obtain permission to engage in these activities, or in any way discouraging the public from accepting the leaflets, or harassing and interfering with the peaceful and orderly conduct of the plaintiff. Jurisdiction was based on 42 U. S. C. § 1983, 28 U. S. C. §§ 1331, 1343 and 2201 and the First and Fourteenth Amendments to the United States Constitution.

Eventually, both parties moved for summary judgment. Judge Mansfield, in a carefully reasoned opinion,[5] granted the plaintiff's motion to the extent of finding that the Terminal area was dedicated to public use as a thoroughfare and that it was therefore an appropriate place for the exercise of rights protected by the First Amendment. He decided that plaintiff had a right to distribute the leaflets and this right could only be restricted under reasonable, limited, and clear regulations promulgated by the Authority. Accordingly, the court declared four sections of the Rules and Regulations unconstitutional and enjoined defendants from interfering with the plaintiff's right to distribute leaflets in a manner that would not unduly obstruct traffic in the terminal. He directed the Port Authority to promulgate new regulations that met standards of uniformity and specificity, to govern distribution of leaflets as well as the other methods of communication proposed by the plaintiff. The Port Authority appealed, challenging this order in its entirety and arguing that the

[5] 268 F. Supp. 855 (S. D. N. Y. 1967).

terminal is an inappropriate place for political expression. The defendants contend that the absolute proscription of such activity embodied in present policy is proper and lawful. In response, the plaintiff has cross-appealed contending first, that the order failed to include a direction that defendants protect plaintiff in the exercise of his rights of protest against harassment from others; second, that the order should include similar protection pending the promulgation of regulations for activities other than the distribution of leaflets but no less protected by the Constitution; third, that the court should have declared the plaintiff's rights irreparably violated by the defendants' past conduct; fourth, that it was error to declare the regulations void only insofar as they involved censorship of protected expression; fifth, that any requirement of prior permission for the activities involved here should be declared invalid. In part the plaintiff's claims are concerned with the phrasing of the terms of the order; in part, as will appear, the cross-appeal points up important issues that were unresolved by the District Court, and which require some modification of the order.

II.

The Port Authority in applying its Rules and Regulations has consistently denied access to its facility to those seeking to use the premises as a forum for expression. The ultimate question before us is whether these policies and regulations "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). To make this determination we must first decide whether the terminal so resembles a public thoroughfare to make it an appropriate place for the exercise of First Amendment rights. Once the threshold to First Amendment analysis is crossed, we must determine

whether the various methods proposed by the plaintiff to communicate his views are entitled to substantial protection under the First and Fourteenth Amendments so that plenary prohibition is impermissible and any regulation should be subjected to the scrutiny and judged by standards of precision applied to restrictions of such important rights.

We first inquire if the Terminal is a place appropriate for political expression. Judge Mansfield saw the determination as between places dedicated to public use where fundamental rights must be recognized and protected and places essentially private where the owner's rights of property and privacy are superior. With the issues thus posed, he properly concluded, that the Terminal is dedicated to the public use, to no less a degree than the streets of a company owned town, *Marsh* v. *Alabama,* 326 U. S. 501 (1946), or the grounds of a World's Fair, *Farmer* v. *Moses,* 232 F. Supp. 154 (S. D. N. Y. 1964), or the parking lot of a shopping center, *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers Local,* 61 Cal. 2d 766, 394 P. 2d 921 (1964), cert. denied, 380 U. S. 906 (1965). He emphasized, and we agree, that the placement of title to property is not dispositive for "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U. S. at 506. Judge Mansfield quoted at length the words of Justice Roberts in *Hague* v. *CIO,* 307 U. S. 496, 515, 516 (1939) which are the touchstone for courts charged with accommodating rights of expression with other interests at play in the public forum:

> Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges,

> immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

In the sense that the general public is afforded ready access to the facilities inside the Terminal, and that the Terminal was created pursuant to compact between two States and administered according to statutory requirements necessary to its function as a facility devoted to public transportation, it cannot be disputed that the Terminal is a public instrumentality—a public place subject to constraints imposed by the Constitution. This determination would conclude our inquiry if the problem involved solely a discrimination in violation of the Fourteenth Amendment and we were asked to determine if the power of the state was so intertwined with the Terminal activity that the Constitution forbade such action. *Reitman* v. *Mulkey*, 387 U. S. 375 (1967); *Evans* v. *Newton*, 382 U. S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4 Cir. 1963).

However, where the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza.[6]

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[6] See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

The Port Authority argues that the Terminal is an inappropriate site for such activity because the interior of a building is not traditionally a place for exercise of First Amendment rights. Moreover, it is urged that the Terminal is unrelated to the subject under discussion and that the purposes for which the building was constructed do not include plaintiff's suggested activity. We disagree with these views because they evidence too little regard for the vagaries of effective communication, and for the versatility of the First Amendment's proscription. As we have already indicated, the character and function of the Terminal, makes clear that it is a thoroughfare used by thousands of people each day. It is one of the busiest passageways in the country, with persons hurrying to and from subways, buses, shops, theaters, and other streets. In design and physical appearance, the main concourse resembles a street. The fifty foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others. Unlike an office building corridor or an apartment house hallway, *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, cert. denied 335 U. S. 886 (1948), the people are not simply using the connecting passageway to reach a place where they engage in different, more pacific or reflective activities. They are in the Terminal for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The Terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living.

Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression. The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that courthouse passages be kept free of demonstration.[7] But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests—and not simply because there is a covering on the building. Indeed, the public forum is surely as traditionally a covered meeting hall as a sunlit arena. *Thomas* v. *Collins*, 373 U. S. 516 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed[8] is attended with noisy crowds and

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[7] *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, cert. denied 335 U. S. 886 (1948), *State v. McNair*, 178 Neb. 763, 135 N. W. 2d 463 (1965).

[8] Under McKinney's Unconsolidated Laws § 6701, a bus terminal exists " . . . for the accommodation of omnibuses and other motor vehicles operated by carriers engaged in the transportation of passengers, or for the loading, unloading, interchange or transfer of such passengers or their baggage, or otherwise for the accommodation, use or convenience of such passengers or such carriers or their employees . . ." It cannot be doubted that the public is afforded free access to the facilities for this purpose, and that the activity is necessarily accompanied by the noise and unrest of hurrying crowds. Further, it is clear that the character and function of the place chosen for protest will affect the limits of tolerable disruption from protest. In *Edwards* v. *South Carolina*, 372 U. S. 229, 233 (1963) the Supreme Court granted protection to "boisterous," "loud," and "flamboyant" conduct in the form of cheering and singing in a statehouse driveway during the day. See also *Cox* v. *Louisiana*, 379 U. S. 536, 546-48 (1965). Similar activity would not receive the same treatment if it was conducted near a hospital, in a public library, an apartment hallway, or a city council

(Footnote continued on next page)

vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum. The admission of charity solicitors, glee clubs, and automobile exhibitions without untoward incident evidences the ease with which the Terminal accommodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values. Cf. *Wirta* v. *Alameda Contra Costa Transit District*, 36 U. S. L. W. 2375 (Calif. Sup. Ct. Dec. 12, 1967).

The defendant argues that the inappropriateness of the place is demonstrated by the fact that Wolin's message bears no special relation to the operations of the Terminal. The propriety of a place for use as a public forum does turn on the relevance of the premises to the protest, but this relation may be found in two ways. In some situations the place represents the object of protest, the seat of authority against which the protest is directed. See *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963). In other situations, the place is where the relevant audience may be found. Here, the plaintiff is attempting to commuicate his antiwar protest to the general public and to a special audience—servicemen traveling to and

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(Footnote continued from preceding page)

chamber, places where "order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation." See *Brown* v. *Louisiana*, 383 U. S. 131, 157 (1966) (Black, J. dissenting) (see also 383 U. S. at 139 (dictum)); *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co., supra; State* v. *McNair*, 178 Neb. 763, 135 N. W. 2d 463 (1965) (singing and marching in city council chamber). See generally, Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773, 1774-75 (1967).

from their bases, particularly buses arriving from Fort Dix. The public is there, more than 200,000 persons a day, and it is likely that the concourse areas are more appropriate for the proposed activity than a narrow sidewalk. And servicemen on leave are in the Terminal also in great numbers.

If the Terminal is a proper place for the exercise of First Amendment rights under appropriate regulations, a denial of these rights cannot be based on the statutory authority granted the Terminal officials to bar miscreants and disorderly persons from the facility. N. Y., Penal Law, § 150.[9] As the able trial judge recognized, "the purpose of such disorderly conduct statutes is to prevent terminals from being infested by those 'who have no occasion to be there,' such as congregations of degenerates or nondescript characters who pose a danger to the public. . . . No such threat is posed here." 268 F. Supp. at 861; see *People* v. *Bell*, 306 N. Y. 110 (1953). The plaintiff is not a "nondescript character" who is a danger to the public. Instead, he seeks to exercise an historic right of freemen, to participate in his society by attempting to persuade others of his position on issues of the utmost importance.

Provocative and controversial the discussion may be, but in the excitement generated by political controversy our preconceptions and prejudices are tested. The framers of the Constitution opted for the disharmony of controversy be-

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[9] "§ 150. Peddling, unauthorized soliciting of business or trade, begging or loitering on air and bus terminal property.

* * *

"2. Any person who loiters about any toilet, area, station, station platform, waiting room or any other appurtenance of an air or bus terminal, or who is found sleeping therein or thereon and who is unable to give satisfactory explanation of his presence is guilty of an offense."

cause they believed that in that unrest lay the best prospect of an ordered society.[10]

Others may quarrel with Wolin's choice of forum and vigorously dispute his message, but we believe the Port Authority may not abridge his right to choose this place any more than they can control his choice of message. We hold the Constitution precludes the Port Authority from enforcing a plenary prohibition of speech within the Terminal.[11]

III.

We must now consider whether Wolin's proposed activities including distribution of leaflets, carrying placards, setting up card tables, and engaging in conversation with others using the Terminal are entitled to substantial protection under the First and Fourteenth Amendments. Judge Mansfield decided the question with respect to the distribution of leaflets; he carefully considered and countered the assorted reasons offered by defendants in justification of an absolute bar on such activity. Thus, a uniform and absolute prohibition could not be defended on the ground that the action would obstruct traffic since there was no contention that every leaflet distribution would be obstructive regardless of time or location. The prospect of littering from the distribution of political circulars within the facil-

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[10] "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949), quoted in *Cox* v. *Louisiana*, 379 U. S. at 551-52.

[11] In the rare case where the speech itself amounts to illegal activity, as where the speaker incites desertion from the armed forces or counsels insubordination by a serviceman, see 18 U. S. C. §§ 1381, 2387, the speaker is of course subject to arrest on warrant or probable cause and to prosecution in the normal course.

ity, while acknowledged, is constitutionally insufficient to support a flat proscription. *Schneider* v. *State,* 308 U. S. 147 (1939). Similarly, the availability of some alternative forum, and the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal, are not material where the issue involves a blanket and wholesale ban. The potential provocation caused by heated debate is not a valid reason to preclude discussion. Judge Mansfield stated it well: "The right of free public expression on political issues is too dearly prized to be curtailed without equally important public cause. Such suppression would be the first step toward ultimate stagnation of essential debate." 268 F. Supp. at 863.

We agree with the District Court that a flat prohibition on distribution of leaflets in a place appropriate for political expression cannot stand. The Supreme Court has clearly recognized that "pamphlets (have) become historic weapons in the defense of liberty," and that "public convenience in respect to cleanliness of the streets" does not justify such drastic interference with precious rights of communication. *Schneider* v. *State,* 308 U. S. 147, 160-61 (1939); see also *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Talley* v. *California,* 362 U. S. 60 (1960); Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1, 15-21; Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 926-28 (1963); *Niemotko* v. *Maryland,* 340 U. S. 268, 273-89 (1951) (separate opinion of Frankfurter, *J.*). It seems to us that these cases clearly establish that non-commercial leaflet distribution is an essential right that cannot be barred except for especially good reasons, and that the burden of street cleaning is not good enough. We believe it beyond dispute that the congestion and controversy that may attend the activity in the Terminal, while pertinent to the enactment of rules and regulations to govern the activity, cannot be invoked to support a flat prohibition.

Although Judge Mansfield directed the defendant to incorporate the other activities proposed by the plaintiff in the new regulations he ordered the Port Authority to issue, the Judge does not seem to have determined if those activities were protected under the First Amendment. His hesitancy is understandable for we might look in vain through recent Supreme Court cases involving public demonstrations for some resolution of the problem whether picketing, marches, placards and similar modes of communication are afforded comparable respect under the Constitution.[12] But we are obliged to resolve the issues sharply presented to us by the record.

We believe each proposed activity must be afforded some measure of protection. Whether we speak of placards or conversation or tables laden with literature[13] we deal with forms of communication developed to express the plaintiff's views to the particular audience. The methods

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[12] The Court seems to remain split on the critical issue whether public demonstrations are entitled to substantial protection. Compare opinions by Justice Black in *Adderley* v. *Florida*, 385 U. S. 39 (1966) and *Brown* v. *Louisiana*, 383 U. S. 131, 151 (1966) (dissenting) with opinions by Justice Fortas in *Brown* v. *Louisiana*, 383 U. S. 131 (1966) and Justice Douglas in *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). See also Justice White's opinion in *Brown* v. *Louisiana*, 383 U. S. 131, 150 (1966) and Justice Stewart's opinion in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963). See Kalven, The Concept of the Public Forum: Cox *v.* Louisiana, 1965 Sup. Ct. Rev. 1.

[13] The New York Court of Appeals has recently decided that the use of card tables on a street for the distribution of political literature is protected against plenary denial. *People* v. *Katz*, —— N. Y. 2d —— (Dec. 28, 1967). The potential of card tables for obstruction of traffic is sufficiently great that it may be reasonable to bar their use from the Terminal even at times when other techniques of communication are permissible. We leave that decision in the first instance to the appropriate officials who draw the regulations.

dopted may be unsophisticated or crude and even ineffec-ual when compared with other means, but they are no less obust and no less intended to air the speaker's views as ffectively as his resources and energy permit.[14] The tech-iques involved here are peaceful and orderly; we deal with n attempt to communicate directly by forms that are classic n simplicity and worthy of emulation. Ronald Wolin does ot present us with a program of coercion or defiance of aws or physical confrontation. He asks that he and his ssociates be permitted to stand with placards and con-erse with persons who accept their handbills; also, that hey be allowed to set their display on tables rather than oors. In this context, such activity is the substance of he "free trade in ideas" no less than the soapbox orator, *bbrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, . dissenting). No less than the leaflet, the newspaper, or he oration it appeals "to the power of reason as applied hrough public discussion," *Whitney* v. *California*, 274 U. S. 57, 375 (1927) (Brandeis, *J.* concurring).

We should in these times be mindful that to the extent ve secure legitimate and orderly access to means of com-unication for all views, we create conditions in which here is no incentive to resort to more disruptive conduct. Ronald Wolin seeks protection through the channels of his overnment of rights accorded him by the Constitution and ve, as the agency of that government charged with secur-ng those rights, ought ensure that no unneeded delay en-umber the exercise of such critical freedoms.

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[14] Professor Meiklejohn put it this way: "What is essential is ot that everyone shall speak, but that everything worth saying hall be said." A. Meiklejohn, Political Freedom: The Constitu-ional Powers of the People 25-28 (1960); V. O. Key, Public Opin-on and American Democracy 378-87 (1961); Barron, Access to the 'ress—A New First Amendment Right, 80 Harv. L. Rev. 1641 1967); Ferry, Masscomm as Educator, 35 Am. Scholar 293 (1966).

IV.

We are brought then to consideration of the regulations under which the plaintiff was denied access to the Terminal. Judge Mansfield found, and we agree, that the present regulations are an excessive delegation of unfettered discretion placed in the power of the Terminal Manager, defendant Rubbert, and that therefore they are unconstitutional. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938). The effect of the present regulations is to empower a single official to refuse access on his mere opinion that a denial will prevent inconvenience and disorder. By such devices official authority can become "an instrument of arbitrary suppression of opinion on public questions." *Cox* v. *New Hampshire*, 312 U. S. 569, 577 (1941).

As we have indicated, the District Court directed the defendant to promulgate new regulations carefully drawn to control the conduct of plaintiff and similar groups within the building. No one can question the legitimate public interest in maintaining a free flow of traffic in the Terminal, in avoiding excessive disruption of normal activities there, in ensuring the convenience and movement of passengers and vehicles. To meet this need, the relevant authority, whether municipal or otherwise, may prescribe "rules of order" for the use of the premises. The character of the place, including the number of persons passing through at different times and the enclosed design of the forum, will affect the degree of restriction tolerable under the Constitution. We need not—indeed it would be inadvisable for us to do so without more adequate information—prescribe in detail the standards or terms of such rules. We believe the drafting of regulations is, in the first instance, properly the function of the responsible officials. But, some guidelines are in order. In accommodating the interest of protesters and general public, the Port Authority may set approximate and reasonable limitations on the

ıber of persons who may engage in such activities at specific time, the duration of the activity and the spe- places within the building where the rights of expres- may be exercised. Certainly, the officials in drawing e rules will be mindful that the plaintiff has a consti- ɔnally cognizable interest in reaching a broad audience, he is entitled to do so within limits tolerable in light he usual activities in the Terminal.[15]

n drawing appropriate regulations the Terminal offi- may consider whether the circumstances justify a re- ement that groups like those represented by the plain- should give advance notice to the Terminal officials. notice requirements must be examined with special in view of the tendency to abuse. See *Cox* v. *New npshire,* 312 U. S. 569 (1941); Freund, Supreme Court Civil Liberties, 4 Vand. L. Rev. 533 (1951). Whether circumstances in this case support such a requirement erly rests in the first instance with the officials who draft the regulations, and therefore, we intimate no on this question.

n the exercise of his rights under fair and reasonable lations, the plaintiff is also entitled to protection by Terminal police.[16] *Hague* v. *CIO,* 307 U. S. 496 (1939);

See, e.g., *Cottonreader* v. *Johnson,* 252 F. Supp. 492 (M. D. 1966); *Williams* v. *Wallace,* 240 F. Supp. 100 (M. D. Ala. ; *Farmer* v. *Moses,* 232 F. Supp. 154 (S. D. N. Y. 1964); *Inc.* v. *Wilson,* 402 Pa. 94, 166 A. 2d 271 (1960); *Anora ement Corp.* v. *Doe,* 171 Misc. 279, 12 N. Y. S. 2d 400 (Sup. 39). Note, Regulations of Demonstrations, 80 Harv. L. Rev. (1967).

In *Wright* v. *Georgia,* 373 U. S. 284, 293 (1963) the Supreme said that "the possibility of disorder by others cannot justify ion of persons from a place if they otherwise have a consti- al right . . . to be present." See also *Brown* v. *Louisiana,* 383 131, 133 n. 1 (1966). Of course the law enforcement officers e permitted to exercise judgment in maintaining order within erminal. We hold simply that the order acknowledge the shed proposition that the speaker must be protected from harassment by others.

Kelly v. *Page*, 335 F. 2d 114 (5 Cir. 1964); *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965). This protection should be included in the order issued by the court so that the officials will be on notice of their constitutional responsibility to protect those properly exercising rights of expression. In this way the district court will be discharging its responsibility to reconcile the interests at odds in the public forum.

One final observation. It is essential that these regulations be issued promptly. The plaintiff has waited many months for the protection of rights secured to him by the Constitution. These rights are as effectively stifled by delay as by suppression.

We therefore affirm the order as modified. The District Court is directed to retain jurisdiction and prescribe a time schedule for the promulgation and adoption of reasonable, non-discriminatory regulations of general application governing the activities proposed by the plaintiff. Pending the adoption and approval of those regulations, the plaintiff and those represented by him will be permitted to engage in such activities in a manner consistent with the standards set forth above.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

MANSFIELD, *District Judge.*

Plaintiff, who sues individually and on behalf of two rganizations which are opposed to United States policy in ietnam,[1] seeks a declaratory judgment that he be per-itted to distribute political leaflets in the main concourse nd other passageways of the Terminal Building ("Ter-inal" herein) operated by the Port of New York Au-ority ("Port Authority" herein) at Eighth Avenue and 0th Street, Manhattan, and used by the public; and that he defendants be enjoined from restraining such activities, rresting him, requiring him to obtain permission to engage n such activities, or discouraging the public by various eans from accepting such leaflets.[2] Jurisdiction is based n 42 U. S. C. § 1983, 28 U. S. C. §§ 1331, 1343 and 2201 nd the First and Fourteenth Amendments to the United States Constitution. The parties have cross-moved for ummary judgment pursuant to Rule 56, F. R. Civ. P.

Defendant Port Authority is a public corporation reated in 1921 pursuant to a compact between New York nd New Jersey. McKinney's Unconsolidated Laws of N. Y. § 6401, § 6404. Its business is conducted by twelve ommissioners, six of whom are appointed by the State of New York and six of whom are appointed by the State of New Jersey. Ibid. § 6405. The Port Authority, among ther things, operates the Terminal which occupies one full city block between Eighth and Ninth Avenues and 40th and 41st Streets in Manhattan. The Terminal contains

[1] The organizations are the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War in Vietnam.

[2] Defendants are the Port Authority, its Manager, the Commanding Officer and various other officers of the Port Authority Terminal Police.

a number of areas open to the public, including a main concourse approximately 50 feet wide, an upstairs and a downstairs concourse, a major subway entrance and various subways and walkways. In addition, within the Terminal there are bus line ticket counters, newsstands, restaurants, snack bars, a bakery, a drugstore, a bar, a bowling alley, a bank, gift shops and various other shops and concessions which are open to the general public. Thousands of people use the Terminal facilities on each day. For example, the average number of persons passing through the Terminal daily in 1966 was 205,000 and on December 24, 1966, approximately 325,000 persons used the Terminal. During 1965 over 68,000,000 persons used the Terminal. It may well be the busiest terminal in the world.

The Port Authority maintains a police force for the purpose of maintaining order in the Terminal and enforcing Port Authority rules and regulations. The force consists of a substantial number of officers serving under the supervision of the Manager of the Terminal, defendant Albert Rubbert. The Manager has instructed members of the Port Authority's police force to arrest any persons who attempt to distribute leaflets in the Terminal when they have been denied permission by the Terminal to do so and have been given an opportunity to leave the Terminal.

At various times during the months of October, November and December, 1966, principally on Sunday evenings, plaintiff and those associated with him have distributed outside the 8th Avenue entrance to the Terminal leaflets criticizing our Government's participation in the Vietnam war. Plaintiff's activities, which have consisted of handing out literature to persons on the sidewalks outside the Terminal and occasionally engaging in conversation with someone who stops to take a leaflet, have at all times been conducted in a peaceful and orderly manner, although they have on occasions led others to call out criticisms, attempt to persuade pedestrians not to accept the leaflets, and on four

occasions assaults have been made upon plaintiff or one of his associates.

On the evening of November 6, 1966, plaintiff and five other persons entered the Terminal and distributed political leaflets in a peaceful and orderly manner in the hallway and waiting area near gates 106-115 on the upper bus level for approximately 80 minutes. Despite the fact that they in no way interfered with the movement of traffic in the Terminal, they were forced to leave by Port Authority Police who threatened their arrest. On November 13 and 20 there were similar occurrences.[3]

By letter dated November 16, 1966, plaintiff, on his own behalf and on behalf of the organizations represented by him and their friends and supporters, requested permission of the Manager of the terminal to distribute political handbills or leaflets relating to our Government's policy with respect to the Vietnam war, to carry placards containing political messages or slogans pertaining thereto, to set up folding card tables for distribution of such political literature, and to engage in discussions with pedestrians who might stop to converse with them. Plaintiff advised that his purpose was to communicate views concerning our Government's participation in the Vietnam war to travelling servicemen and members of the public within the Terminal, that plaintiff and the groups represented by him did not intend to interfere in any significant or substantial way with the operation or use of the Terminal for the convenience of bus passengers or other persons using the building, and that plaintiff desired to engage in such activities inside the Terminal rather than be relegated to the sidewalk perimeters for the reason that plaintiff's communication of his group's messages to pedestrians waiting inside the Termi-

[3] The parties have stipulated that on November 13 no "incidents" occurred and there was no interference with the free flow of traffic in the Terminal. There is no evidence as to whether there was such interference on November 20.

nal would be more effective than attempts to communicate views to persons using the sidewalks to enter or leave the Terminal, since passengers waiting inside the Terminal concourse had more time and hence were more receptive than those hurrying across the sidewalk to or from the Terminal. Plaintiff further advised that if a group of bystanders, in response to plaintiff's dissemination of such information, should create any interference with traffic, plaintiff and his group would call upon their members to disperse, and plaintiff would temporarily cease activities until such a situation no longer existed, so that his activities would not obstruct the passage of anyone in the Terminal or interfere with the operation of any business or concession therein.

On November 17, 1966, defendant Albert Rubbert, Manager of the Terminal, responded that plaintiff's request was denied pursuant to the Port Authority's standing policy of refusing to permit anyone to engage in picketing, demonstrations and leaflet distribution. He further advised that if, notwithstanding such refusal, plaintiff attempted to engage in such activities, he would request the Port Authority police to arrest them after a reasonable opportunity was given to cease such activity.

It has been stipulated between the parties that the Port Authority and the defendant Rubbert have in the past granted permission to various charities to solicit contributions in the Terminal, that they have permitted glee clubs to sing Christmas carols in the Terminal, which were broadcast over the loud speaker system, and that they have, for a fee, permitted automobile manufacturers to place automobiles and advertising material on display in the Terminal.

A threshold question is whether the Port Authority Terminal is a public or quasi-public place. If it were private property, used for the owner's private purposes, the plaintiff's Constitutional right to disseminate ideas and

communicate beliefs and views would be required to yield to the owner's right to be protected against trespass or invasion of his Constitutional right of privacy. Adderley v. State of Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966); Watchtower Bible & Tract Society v. Metropolitan Life Insurance Co., 297 N. Y. 339, 79 N. E. 2d 433, 3 A. L. R. 2d 1423, cert. denied, 335 U. S. 886, 69 S. Ct. 232, 93 L. Ed. 425 (1948). If, on the other hand, the Terminal is property essentially dedicated to public use, the citizen's fundamental right freely to express his views in a public place must be recognized and this right may be curbed only to the extent that reasonable, non-discriminatory regulation is essential to prevent crippling the primary public use to which the property is dedicated. As the Supreme Court stated in Marsh v. State of Alabama:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
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> * * *
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> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, * * * we remain mindful of the fact that the latter occupy a preferred position." (326 U. S. 501, 506, 509, 66 S. Ct. 276, 278, 280, 90 L. Ed. 265 (1946))

The citizen's Constitutional right under the First and Fourteenth Amendments to communicate ideas and views to his fellow citizens, however unpopular such views may be, represents one of the bulwarks of our free, democratic society. Traditionally our public streets, meeting halls, parks and similar places have been recognized as locations in which this sacred right may be exercised, not only because such places, being dedicated to public use, are held in trust for all citizens, but also because they are usually locations

where the ears of large numbers of fellow citizens can most effectively be reached. Such public sites are the "natural and proper places for the dissemination of information and opinion". Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); Hague v. CIO, 307 U. S. 496, 515, 516, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." (From opinion of Mr. Justice Roberts in Hague v. CIO, 307 U. S. 496, 515-516, 59 S. Ct. 954, 964, which was later adopted as the opinion of the Supreme Court.)

In determining whether a particular location, such as the Terminal in the present case, is a public one, we look to substance rather than to form. The fact that title to the site may be held in the name of a separate corporation or entity is not controlling, if in fact its purpose and use are public in nature. Marsh v. State of Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); Farmer v. Moses, 232 F. Supp. 154 (S. D. N. Y. 1964). Dedication of property to public use in effect dedicates it to the exercise by the public of Constitutional rights, including the rights of free speech and assembly under the First Amendment.

Applying these fundamental principles here, there can be no serious question about the fact that the Terminal is essentially a public establishment, dedicated to public use. It is a creature of the States of New York and New Jersey. It exists and operates under their direction and control, being an agent of both states, McKinney's Unconsolidated Laws § 6451; Port of New York Authority v. J. E. Linde Paper Co., 205 Misc. 110, 127 N. Y. S. 2d 155 (1953); Port of New York Authority v. City of Newark, 17 N. J. Super. 328, 85 A. 2d 815 (1952). Its powers emanate from an agreement between the two states. Its Terminal is designated by statute as being "in all respects for the benefit of the people of the states of New York * * *," and the Port Authority is described as performing an essential "governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto", McKinney's Unconsolidated Laws § 6703.[4] Its securities are tax exempt, Ibid. § 6459. It has the power of subpoena (Ibid. § 6463) and its police force are expressly provided with all the powers of "peace officers" (N. Y. Code of Crim. Proc. § 154). Although it is true, as defendants note, that a "bus terminal" under New York law (Ibid. § 6701) exists

> "* * * for the accommodation of omnibuses and other motor vehicles operated by carriers engaged in the transportation of passengers, or for the loading,

[4] "*§ 6703. Benefits from terminal: construction as governmental function*

"The establishment, maintenance and operation of such motor bus terminal within the port of New York district is and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto."

> unloading, interchange or transfer of such passengers or their baggage, or otherwise for the accommodation, use or convenience of such passengers or such carriers or their employees * * *."

the operation of the Terminal requires the Port Authority, as a practical matter, to permit the general public to have free access to the concourse, waiting rooms, and shops and services located in the Terminal building. It has not been suggested that non-passengers are excluded from the Terminal. On the contrary, it appears that certain portions of the Terminal (such as the concourse) may be used by members of the public for the purpose of patronizing shops or other services located in the Terminal building, and that friends of passengers may freely use the waiting room facilities. No fee is exacted as a condition to entry into the Terminal, a factor considered relevant by the Court in holding that the concourse or well of the Pennsylvania Railroad Station in New York City was a public place in which picketing might be conducted. People v. Barisi, 193 Misc. 934, 86 N. Y. S. 2d 277 (Magistrate's Ct. 1948). Unlike the jail grounds in Adderley v. State of Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966), which the Supreme Court found *not* to be open to the public, since the jail was "built for security purposes", the Terminal here is open to the public and is at least as "public" a place as the "company-owned" town in Marsh v. State of Alabama, supra, and as the grounds of the New York World's Fair, which Judge Tyler of this Court found to be a location where the public was entitled to distribute leaflets, even though a fee was charged for admission to the fair grounds. Farmer v. Moses, 232 F. Supp. 154 (S. D. N. Y. 1964).[5] In effect the concourses of the Ter-

[5] See also Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union Local No. 231, 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P. 2d 921 (1964), cert. denied, 380 U. S. 906, 85 S. Ct. 888, 13 L. Ed. 2d 794 (1965) (shopping center parking lot); People v. Ribinovich, 171 Misc. 569, 13 N. Y. S. 2d 135 (Spec. Sessions, 2d Dept. 1939) (Coney Island boardwalk).

minal, like the streets of New York, function as a thoroughfare through which an average of over 200,000 pedestrians pass daily for the purpose of getting to and from their places of business, homes, shops, and other locations.

Defendants rely upon § 150 of New York's Penal Law, McKinney's Consol. Laws, c. 40 as evidencing an intent that as far as persons in the position of the plaintiff are concerned a bus terminal is to be considered private property.[6] Their reliance, however, is misplaced. As New York's Court of Appeals noted in People v. Bell, 306 N. Y. 110, 115 N. E. 2d 821 (1953), in construing identical language in § 1990-a of the Penal Law, the purpose of such disorderly conduct statutes is to prevent terminals from being infested by those "who have no occasion to be there", such as congregations of degenerates or nondescript characters who pose a danger to the public. In the interest of public welfare and safety, the law prohibits a bus terminal from being turned into a public housing development for reprobates who might rush like lemmings to its shelter and thus congest and disrupt its essential operations. No such threat is posed here. Furthermore, as the Court noted in *Bell*, there are many purposes other than travel for which a citizen may lawfully be present in a terminal (e.g., patronizing shops, bowling alleys, or using toilet facilities) so that the legitimacy of a person's presence in a terminal must be "decided as the case arises". Recognizing the reluctance of New York's highest court to affirm convictions in the absence of proof of more than mere unexplained presence in a ter-

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[6] "*§ 150. Peddling, unauthorized soliciting of business or trade, begging or loitering on air and bus terminal property.*

* * *

"2. Any person who loiters about any toilet, area, station, station platform, waiting room or any other appurtenance of an air or bus terminal, or who is found sleeping therein or thereon and who is unable to give satisfactory explanation of his presence is guilty of an offense."

minal (See Bell, and People v. Dreares, 15 A. D. 2d 204, 221 N. Y. S. 2d 819 (1st Dept. 1961), aff'd. without opinion, 11 N. Y. 2d 906, 228 N. Y. S. 2d 467, 182 N. E. 2d 12 (1962)), we do not view § 150 of the Penal Law as casting doubt on our conclusion that the Terminal concourses are essentially public thoroughfares which may be used by persons like the plaintiff here who do not fall within the category of miscreants intended to be barred.

The fact that the concourses of the Terminal are public does not have the effect of granting a license to the plaintiff or other citizens to engage in unbridled or uncontrolled activities in the name of Constitutional freedom. It must be remembered that the primary purpose and principal function of the Terminal is to provide transportation facilities for the more than 200,000 people who use it daily. The public is entitled to such service free from any substantial obstruction and toward that end the Port Authority may exercise its governmental responsibility to insure the free flow of traffic through the Terminal, unimpeded and unhampered to any substantial degree by distribution of leaflets, picketing, or similar conduct. As the Supreme Court recently pointed out in Cox v. State of Louisiana, 379 U. S. 536, at 554-555, 85 S. Ct. 453, 464, 13 L. Ed. 2d 471 (1965):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of

> some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

In the exercise of its responsibility to insure the flow of traffic through the Terminal, free from any undue obstruction the Port Authority may promulgate reasonable, uniform and nondiscriminatory regulations of general application that are calculated to achieve that objective. McKinney's Unconsolidated Laws § 6419. In the absence of proof that the proposed activities here, however, would obstruct or hamper the Terminal for transportation purposes, the Port Authority may not ban such activities altogether. In balancing the citizen's Constitutional right to communicate ideas and views against the public responsibility to maintain a free flow of traffic, the exercise of Constitutional rights will be favored unless it is shown that prohibition is essential under the circumstances to insure operation of the Terminal for its primary purpose.

It does not appear to be contended by the defendants that every leaflet distribution would automatically obstruct traffic regardless of the time, frequency and number of leafleters involved. On the contrary, they have stipulated that on at least two occasions plaintiff's leafleting within the Terminal was peaceful and did not interfere in any way with the movement of pedestrian traffic. Thus the present case is clearly distinguishable from those where

the challenged conduct, usually picketing in a labor dispute, has been found to obstruct or impede the flow of traffic, e. g., Adderley v. State of Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966); Nelson v. Chicago, CCH Aviation Service ¶17,878 (N. D. Ill. 1965).

Notwithstanding the relatively peaceful nature of plaintiff's activities to date, and the absence of any adverse effect on the operations of the Terminal, defendants argue that the controversial nature of the subject matter of plaintiff's leaflets (protests against our Government's involvement in Vietnam) will lead to violence or rioting, particularly since the Terminal is heavily frequented by members of the Armed Services. Recent anti-Vietnam "marches", "parades", and similar activities in New York City, lend some support to defendants' apprehensions. On the other hand, plaintiff has represented to the Court that in such event he and his group would suspend their activities until they could be resumed peacefully; and should plaintiff's activities lead to violence, riots or other obstruction of traffic appropriate relief must be made available. However, it is the very expression of views with respect to controversial political issues that most requires protection under the First and Fourteenth Amendments, however distasteful such views may be to certain segments of our society. The right of free public expression on political issues is too dearly prized to be curtailed without equally important public cause. Such suppression would be the first step toward ultimate stagnation of essential debate. See Edwards v. South Carolina, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).

Other "reasons" submitted by the defendants are equally unimpressive. The fact that the passing out of leaflets might lead to the littering of the Terminal building is unfortunate but certainly is not a sufficient justification for circumscribing a person's Constitutional rights. Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct.

146, 84 L. Ed. 155 (1939). Nor does the fact a person might impart his ideas effectively in another place provide any reason for denying a person's right to manifest his views in a spot of his own choosing. Ibid. The contention that the operation of the Terminal building would be stifled by a flock of leafleters subsequent to a decision adverse to the defendants carries little weight since the Court is dealing only with the rights of the plaintiff and those whom he represents. Farmer v. Moses, supra.

Defendants further contend that they are entitled to bar plaintiff's proposed leafleting activity by virtue of the following rules and regulations promulgated by the Port Authority pursuant to § 6419, McKinney's Unconsolidated Laws:

> "2. The Superintendent of the Terminal shall have authority to deny the use of the Terminal to any individual violating Port Authority Rules and Regulations, or laws, ordinances or regulations of * * * the State of New York York or the City of New York.
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> * * *
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> "5. No person shall carry on any commercial or other activity at the Terminal without permission.
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> * * *
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> "8. No person shall post, distribute or display signs, advertisements, circulars or printed or written matter within the Terminal without permission."[7]

In practice the Port Authority has delegated to the defendant Rubbert, Manager of the Terminal, the decision as to whether permission will be granted or denied in any particular case, which he exercised to deny plaintiff's written request of November 16, 1966. The effect of these regulations, therefore, is to vest in one individual the awesome power, unrestricted by any objective standards, to grant or

[7] In addition, without defining what constitutes a "nuisance", Regulation 12 prohibits any person from doing any act or thing which shall result in a creation or maintenance of a "nuisance" at the Terminal.

deny any application for reasons wholly unconnected with the flow of traffic, and thus to censor the expression of views with which he disagrees. In addition the activities proscribed are so vaguely described as to make it difficult, if not impossible, for the average citizen to guess what might be permitted. For these reasons such regulations are patently unconstitutional. Cox v. State of Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943); Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); Schneider v. State of New Jersey, supra; Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938). They threaten the fabric of a free society by permitting unrestricted censorship of causes and views. Already, for instance, the Manager of the Terminal has exercised this power to permit certain charities to solicit funds within the Terminal. Nothing prevents him in his absolute discretion from exercising the same power to permit certain groups to distribute leaflets and to deny that right to others.

For all of the foregoing reasons plaintiff's motion for summary judgment must be granted to the extent that plaintiff and those represented by him may engage in distribution of leaflets within the concourses of the Terminal in a manner that does not substantially or unduly impede either the flow of pedestrian traffic through the Terminal or the furnishing and use of transportation and other services offered by the Terminal. The activities of the plaintiff and of other leafleters may also be subject to such reasonable, uniform, objective and non-discriminatory regulations of general application, with limited discretion vested in appropriate administrative officials, as may be adopted by the Port Authority for the purpose of assuring the flow of traffic. Presumably such regulations, in order to maintain a balance between the different rights and interests involved, would prescribe the number of persons who may

engage in such activities at specific times, their duration, the procedure for obtaining permission, the limit on number of permits for a given period, the places within the Terminal where such persons may be stationed, and other similar restrictions of general application. The flow of traffic might even require that during certain peak travel hours any such activities must cease. For instance, photographs submitted by the parties show the concourses to be crowded at certain times and virtually empty at others. The problems faced in adopting reasonable regulations appear to be essentially the same as those resolved by municipal authorities in adopting rules regulating such conduct in public streets, parks and other places.

Pending the adoption by the Port Authority of reasonable, non-discriminatory regulations of general application, the plaintiff and those represented by him will be permitted to engage in distribution of leaflets to the extent heretofore indicated, in accordance with an order fixing terms and conditions more specifically.

Settle order.